

especially seeing the intenting of a process for mails and duties can be no such qualification of possession as can clothe or prefer the said base right. This is very dubious.

*Secundo, Quæsitum*, in this process, if a bond or other writ be false in the date, as being antedated, whether that will so annul the whole deed as to make it fall *in totum*, or if they will be permitted to rectify the same; especially where the party-quarreller is found to have no prejudice by the changing or altering of the date, or to have no interest though it were of that date which he contendeth for. Yet Sir George Lockhart concluded such a deed would be utterly null. And it was remembered how in *Shaw and Calderwood's* case in *July 1670*, (which see *supra*, No. 60,\*) where a disposition having been granted on death-bed, and antedated, and quarrelled on these grounds, and being proven to have been false in the date, and not subscribed at that time it bore, the Lords did annul and reduce it simply, as if it had been granted on death-bed; notwithstanding that the defender condescended upon the true date thereof, and offered him to prove that when it was truly subscribed the granter was not *in lecto*, in so far as he came to kirk and market unsupported after the same, and so the pursuer had no prejudice, nor the defender advantage, by the change of the date. Which the Lords repelled, as is said, and notwithstanding thereof found the said disposition null; which they judged necessary for the better coercing and restraining of that growing falsehood; and which though not punished hitherto, otherwise than by the annulling of the deeds, yet the danger may result to men's securities by such increasing boldness, seems necessarily to require some farther censure. And the pretence, that the party hath no prejudice by it, ought no more to be regarded here than by the 22d act of Parliament in 1621, the allegiance, that they only made a false writ, but never used it to the hurt of any, is not sufficient to liberate them from the punishment of forgery.

Neither was this a new decision; seeing Dury, at the 10th of *February, 1636*, *Edmiston* against *Syme*, observes the same to have been so found by the Lords then; as also, *Craig*, p. 156, is clear of this opinion: *Quod non est verum in data quam præ se fert, præsumitur non esse omnino verum, nec ullo tempore fuisse gestum.*

*Advocates' MS. No. 375, folio 155.*

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1672. *November 20.* GEORGE AND DONALD CAMPBELL *against* THE EARL OF ARGYLE.

MR. GEORGE and DONALD CAMPBELLS, sons to George Campbell, Sheriff of Argyle, as executors to their brother, Mr. Archibald, who had right from his father to the bond undermentioned, pursued the Earl of Argyle for payment of the sum of 8000 merks, contained in a bond granted by him to the said George. The DEFENCE was, that he offered him to prove by George Campbell, the cedent's oath, that the bond was granted blank in the creditor's name to M'Naughtan, and that the same was granted *ob turpem et inhonestam causam*, and so was null,

\* See it fully at the 11th of February, 1669, *Shaw and Handyside* against *Calderwood*; *infra*, No. 431, in November 1673, *Lady Grange*; *infra*, No. 578, § 4, [20th June 1677.]

and noways obligatory against the Earl, (and upon which reason there was reduction of the said bond depending;) in so far as the Earl and M'Naughtan having been employed in his Majesty's service against the late usurpers in 1653 and 1654, in the hills, and the usurpers having taken Sir Arthur Forbes, an officer of chief quality prisoner; as also M'Naughtan and his Majesty's forces having taken Colonel Bryan prisoner; the Earl, upon the account of furthering his Majesty's service, and for personal respects to Sir Arthur, did urge M'Naughtan to exchange Bryan, his prisoner, with the said Sir Arthur: which M'Naughtan most unjustly refused, except the Earl would grant this bond; which the Earl, finding Sir Arthur's release otherwise impossible, out of zeal to his Majesty's interest, and yielding to the present necessity, did at length condescend to; and that the same was most unjustly exacted and extorted by M'Naughtan, seeing, by the rules of military law and honour, he ought not to have refused the exchange gratis: and this benefit he made of his said prisoner was *turpis quæstus et inhonesta nundinatio; (et omne turpe lucrum is extorquendum;)* seeing the ransom of prisoners taken in war belongs to his Majesty, or the general by whose authority the war is managed, and not to private persons, takers, such as M'Naughtan was: and therefore the bond, as granted *ob turpem et injustam causam*, as strongly and pregnantly qualified as any can be founded in law, is null, and should be reduced.

ANSWERED *Imo*, This reason cannot meet the executors, who are not obliged to depone thereon, seeing their oath will not infer their exoneration. *2do*, The reason of reduction is noways relevant, because Colonel Bryan did *jure belli* belong to M'Naughtan, seeing *capti et capta fiunt capientium*; and, therefore, might dispose upon him as he pleased; and was not bound in duty, nor at the Earl's desire, either to release him, or exchange him, but make the best use of his prisoner he could, and apply the ransom (called in law *lytrum* or *prætium redemptionis*,) to his own particular use.

REPLIED,—That the old Roman law *Instit. de Rerum divisione, et acquir. rerum dominio*, § 17, making *capta in bello* to become *capientium*, is of a long time fallen in desuetude: so that now, soldiers do not, by the received custom and manners of most nations, any more acquire the things taken to themselves, but take for the prince, state, or commonwealth that employs them, at least for the general person, or those having chief command under them: so that it was most unwarrantable in M'Naughtan to make advantage of that prisoner, which by the law of war was not his, but belonged to his Majesty, who, or his commissioners, had the sole power of releasing, discharging, or ransoming him; especially considering that he was a staff officer, who, by the concessions of all authors, when made prisoners, do ever belong to the prince or state by whose authority the war was carried on, and never to inferior officers.—See Vinnius *ad illum parag. : item ad paragraphum, Servi, ante 3 Instit. de jure personarum, numeris 4 et 5*.

DUPLIED,—They confess, in a public, stated, and solemn war, where soldiers are stipendiary and paid by the Prince, there may be some ground to think the prisoners and their ransom *et res aliæ bello captæ* should cede to the fisk or employers; in which case general and supreme officers upon the field ought only to order and dispose the prisoners as they think fit, being taken *in ministerio publico*: but where the war is deserted by the general officers, and they are no more in the field, but the war and private acts of hostility are continued by some out of zeal to his Majesty and country's decaying interest, and hatred against the usur-

pers, without all pay, but maintained on their own private fortunes, (as was M'Naughtan's case here,) the *præda*, whatever it be, as *præmium laboris* must belong to them *quorum meruere sudores*; and that most justly: for why should that be acquired to the public treasury, where they contributed nothing to the maintenance of the said war and subitaneous excursions? and which is the case of privateers, and which we signify in these terms, of "no purchase, no pay." And therefore the general officers, Glencairne and Midleton, being then gone, he might very well sell his prisoner of war for ransom, to compensate his own pains, reimburse his charges, and pay his soldiers under his command; especially considering that the Earl who transacted with him had no superior command over him to make him quit his prisoner, but upon his own terms; as also hath homologated the said deed, by granting a new bond for the same about two years after, viz. in 1656; like as he gave up this bond among the list of his debt, and got a locality in his father's estate in contemplation thereof, and which he hath possessed these eight years.

Both parties were very strong in their citations out of Grotius. For the Earl he was cited, *lib. 3, de Jure Belli et Pacis, cap. 6to, de jure acquirendi bello capta, Nis 8, 9, 10, et seq.; ubi* he expressly asserts, *Qui in militando vel quavis alia re operam suam addixerunt aliis, statim quod acceperunt acquirunt illis quibus operam navant; et qui capit per alios æque capit quam qui per se. Qui tanquam minister capit, non sibi sed ei sub cujus auspiciis bellum geritur, acquirit; quia ibi (ut habet, No. 14,) singuli reipublicæ personam sustinent, et proinde respublica, rex, seu populus per eos ut possessionem ita et dominium rerum captarum nanciscitur, et in quos vult transfert.* Likeas, *eodem lib. 3, cap. 7, No. ult.;* he is most positive that captives may be detained, even amongst Christians, till they pay their ransom, and that the same belongs to the taker, unless the prisoners be *personæ egregiæ dignitatis*, (which by the general consent of nations, is expounded to be all staff officers;) *in has enim reipublicæ aut ejus capiti jus dant plærarumque gentium mores.* As also, *eodem lib. 3tio, cap. 22, de fide minorum potestatum No. 9, ubi habet, Homines imperia, agros bello quæsitos concedere ducum non est, sed in tales populi vel principis est judicium sive arbitrium;* so that the taker cannot, without leave of his general, either free or otherwise dispose upon his prisoner: and which is most just; seeing the releasing or detaining of some prisoners may be of great moment to the whole fortune of the war. They also cited Bartolus et Baldus, *ad l. Nam et Servius, 21 D. de negotiis gestis;* but Bartolus hath nothing there to this purpose.

The pursuers seemed to be very clearly founded in the same Grotius his opinion, *lib. 3, cap. 6, Nis 23 et 24,* where he avers, that by a tacit custom it hath every where prevailed, *ut sua faciant quæcumque capiant aut socii aut subditi, qui sine stipendio, et suo sumptu, suoque periculo, bellum gerunt; imo, quando pro stipendio militant, nisi sit tale quod operæ respondeat;* which seems to confirm all they contend for.

The Lords declared they would hear it in their own presence. And though it be a very intricate case, yet, all circumstances being well pondered, I think the Earl should lose the cause.

The usual ransom of soldiers or inferior officers amongst the Dutch, is a month's pay of the prisoner; so William Aglonby, in his Present state of Holland, *page 122, lib. 2, cap. 16.* A. G. Costanus thinks it may be the third part of the cap-

tive's goods; *arg. p. 2, institutionibus, de successione libertorum*; but the parallel is farfetched. See him *questione 2. Vinnius, ubi supra*, says, *Nunc inter milites ut plurimum menstruo stipendio definitur*. See Joannes Voet, *de jure militari, cap. 5, page 276.* *Advocates' MS. No. 376, folio 155.*

1672. *December.* The LORD LYON *against* The FEUARS of BALVENY.

IN the special declarator pursued by My Lord Lyon, as donatar to the single and liferent escheat of the deceased Lord Salton, against the Feuars of Balveny, for making payment to him, as donatar foresaid, of sundry sums of money, contained in bonds granted by them to the said Lord Salton, rebel; compearance having been made for Arthur Forbes, it was ALLEGED the said bonds could not fall under the late Lord Salton's escheat, because this gift and pursuit was only taken by my Lord Lyon to his brother-in-law, the Master of Salton's behoof: to the which Master of Salton the said sums sought by the donatar to be adjudged to him, do properly belong, and not to the deceased Lord Salton, under whose escheat it is craved they may be declared to have fallen: in so far as the Master having acquired the right of the Lordship of Balveiny from the Lairds of Blackhall and Kinminnity, in whose persons the same stood; he, at the same time, did grant a backbond and reversion to the said Blackhall, wherein he declares, all he paid for his said right was allenary L. 38,000, and that the same should be redeemable from him upon the re-payment of that sum; and declares that, seeing most of the vassals of the lordship were componsing for confirmation of their feus, and for new rights, and from whom considerable sums of money were expected, that he should, for his own better security of payment, do exact diligence to transact with such of the vassals for new securities to be given them who had not yet transacted, and to perfect the rights and confirmations of such as had transacted already, and from both should uplift their compositions in part of payment to him of the aforesaid sum of L.38,000 of wadset; and whatever he received upon that account he obliges himself to deduct it from the said sum of L. 38,000, and impute it in payment thereof *pro tanto*. To this backbond and reversion Arthur Forbes having acquired right, is confident the Master is well near paid by his intromission with the said sums paid to him by the vassals for rights; and hath a count and reckoning depending against him for that effect: and which backbond the Master would, in a most disingenuous manner, altogether evacuate and render ineffectual, by this method and unhandsome contrivance,—that the Lyon takes a gift of the late Salton's escheat, though truly to the Master's own behoof; and under that most unjust and unworthy conveyance, should enhance and absorb the said sums payable by the vassals for their compositions, (and which were destinate for his own payment of the foresaid wadset sum, and most of them so applied, and who has sole and best right thereto,) under the late Lord Salton's escheat, forsooth, that so the Master may still have power to clog and affect the said lands and Lordship of Balveiny with the foresaid whole sum of L.38,000, as though none of it were paid; suffering by collusion the said sums to be abstracted and carried away by the donatar, though